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COMMENTS

R. MAGANLAL COMPANY v. M.G. CHEMICAL COMPANY: A MINOR CASE WITH MAJOR ISSUES—CONVENIENCE, CONFLICTS AND COMITY RECONSIDERED IN THE CONTEXT OF FORUM NON CONVENIENS

I. INTRODUCTION

Due to the rapid expansion of international business markets and the popularity of American courts, United States federal courts have played an increasing role in the adjudication of international commercial disputes.¹ This development has raised the importance of forum non conveniens² as a judicial

1. This popularity arises primarily from the procedural differences between U.S. litigation and that of other countries. Favorable aspects of the American legal system include: broader discovery; greater reliance on the adversarial system; trial by jury; fee shifting and contingency fee arrangements; higher damage awards; and different choice-of-law rules. These differences have been extensively documented in MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 167-92 (1975). See also Susan L. Birnbaum & Douglas W. Dunham, *Foreign Plaintiffs and Forum Non Conveniens*, 16 BROOK. J. INT'L L. 241, 242 (1990) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 252 n.18 (1981)); David Boyce, *Foreign Plaintiffs and Forum Non Conveniens: Going Beyond Reyno*, 64 TEX. L. REV. 193, 196-204 (1985).

2. Forum non conveniens is a judicially created doctrine which originated in equity as a discretionary mechanism for declining to hear an action in a forum which would be inconvenient despite the fact that jurisdiction is proper in the plaintiff's chosen forum. See 15 CHARLES A. WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE: JURISDICTION* § 3828, at 278 (2d ed. 1986); CHARLES A. WRIGHT, *THE LAW OF FEDERAL COURTS* § 44, at 259 (4th ed. 1983). Dismissal on the basis of forum non conveniens requires that there be an alternative forum where jurisdiction is proper and where the suit can be maintained at a far greater convenience to the parties and the courts. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 506-507 (1947).

tool to decline jurisdiction in light of potentially more appropriate forums abroad and the crisis of court congestion here in the United States. As the number of forum non conveniens motions has increased,³ so has the academic debate over its appropriateness as a jurisdictional doctrine.⁴

The forum non conveniens doctrine functions to restrict access to United States courts when the forum is inconvenient both to the parties and the court itself, and the forum state has relatively little interest in the controversy.⁵ This determination is a result of balancing the plaintiff's honored choice of forum against the potential burdens on the defendant and the competing interests of the local and foreign forums.⁶ Aspects of the burden posed by the respective forums to each party are referred to as "private interest factors." Primarily, these factors entail practical difficulties in obtaining evidence and witnesses that may be outside the forum.⁷ "Public interest factors" involve the inconvenience to the court posed by docket congestion and complex issues of foreign law, as well as the state's interest in the adjudication of a suit which may be more significantly related to an alternate forum.⁸ By scrutinizing the convenience of the plaintiff's choice of forum, forum non conveniens also serves as a deterrent to forum shopping.⁹

3. Allan R. Stein, *Forum Non Conveniens and the Redundancy of Court-Access Doctrine*, 133 U. PA. L. REV. 781, 785 n.12 (1985). This author's Westlaw survey showed that forum non conveniens decisions by federal courts more than tripled between 1975 and 1985. *Id.* at 831-32 n.216 and accompanying text.

4. *Id.* at 783 nn.4-5; see generally Janeth Duque, Comment, *The Second Circuit Review—1986-1987 Term: Civil Procedure: The Southern District Reexamines the Doctrine of Forum Non Conveniens*, 54 BROOK. L. REV. 379 (1988); Henry J. Friendly, *Indiscretion About Discretion*, 31 EMORY L.J. 747 (1982); Margaret G. Stewart, *Forum Non Conveniens: A Doctrine in Search of a Role*, 74 CAL. L. REV. 1259 (1986).

5. See Stein, *supra* note 3; *infra* notes 30-76 and accompanying text.

6. The plaintiff is the "master of the complaint." See, e.g., *Caterpillar Inc. v. Williams*, 482 U.S. 386, 398-99 (1987). Therefore, there must be significant justification for dismissal of the plaintiff's chosen forum. See *Koster v. Lumbermans Mut. Casualty Co.*, 330 U.S. 518, 524 (1947).

7. See *infra* notes 44-49 and accompanying text.

8. See *infra* notes 50-54 and accompanying text.

9. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 507 (1947). For an extensive discussion of forum shopping, see Note, *Forum Shopping Reconsidered*, 103 HARV. L. REV. 1677 (1990).

Given the unorthodox nature of *forum non conveniens* as a means of depriving the plaintiff of her chosen forum despite its jurisdictional competence, the defendant has the burden of showing that these public and private interests weigh heavily in favor of dismissal.¹⁰ Despite this high standard, some courts have resisted the application of *forum non conveniens* out of a protective attitude towards foreign plaintiffs and an expansive notion of the state's interest in controversies arising abroad.¹¹ *Forum non conveniens* also has been criticized in the recent past because of its inconsistent application and redundancy in light of related doctrines of personal and prescriptive jurisdiction.¹²

Three reasons are generally given for policies against forum shopping: first, that forum shopping undermines the authority of substantive state law, second, that forum shopping overburdens certain courts and creates unnecessary expenses as litigants pursue the most favorable, rather than the simplest or closest, forum, and, third, that forum shopping may create a negative popular perception about the equity of the legal system.

Id. at 1684 (citations omitted).

10. See *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170, 180 (3d Cir. 1991) ("To prevail on a *forum non conveniens* motion, the movant must show that the balance of these factors tips decidedly in favor of trial in the foreign forum If, when added together, the relevant private and public interest factors are in equipoise, or even if they lean only slightly towards dismissal, the motion to dismiss must be denied.") (citations omitted). See also *Koster v. Lumbermans Mut. Casualty Co.*, 330 U.S. 518, 524 (1947).

11. See *infra* note 21. See also Duque, *supra* note 4, at 380 (citing Note, *Recent Developments, Federal Courts: Forum Non Conveniens*, 20 HARV. INT'L L.J. 404, 412 (1979)) ("The unwillingness by some courts to dismiss actions to competent foreign courts on grounds of citizenship alone may reflect an unmindful orientation overly protective of United States citizen plaintiffs and insufficiently sensitive to the ability of foreign courts to perform their adjudicatory functions fully as well as do the courts of the United States.").

Alternatively, commentators also have argued in favor of protectively limiting the role of comity and restricting *forum non conveniens* dismissals in the area of private international law where corporate industries seek the less regulatory legal systems of jurisdictions abroad. See generally Joel R. Paul, *Comity and International Law*, 32 HARV. INT'L L.J. 1 (1991).

12. See generally Stewart, *supra* note 4. See also Stein, *supra* note 3. Stein criticizes the *forum non conveniens* doctrine stating:

The emergence of *forum non conveniens* doctrine was facilitated by a set of formal court-access principles that unduly compartmentalized and irrationally classified the various considerations determining when and why courts have authority to hear cases. The limitations on judicial authority reflected in the *forum non conveniens* doctrine are not significantly different from

However, forum non conveniens still has an important role to play in effectively responding to the severe congestion of federal court dockets¹³ and mediating the tensions between competing jurisdictions that result from foreign plaintiffs' recourse to American courts.¹⁴

Historically, the forum non conveniens doctrine has focused most heavily on private interest factors.¹⁵ However, a proper evaluation of private interest factors necessarily implicates issues of comity¹⁶ and conflicts-of-law which traditionally have

the kinds of limitations reflected in rules governing subject-matter jurisdiction, personal jurisdiction, and venue. Yet resolution of forum non conveniens motions is relegated to an informal and inconsistent process. Because we conceive of the decision whether to reject the jurisdiction that the court formally possesses as purely discretionary, and the product of some intangible balance of innumerable factors, the substantive implications of the doctrine are obscured.

See Stein, *supra* note 3, at 841.

As early as 1949, shortly after the establishment of the forum non conveniens doctrine in the United States, the doctrine was already drawing criticism. In response to a study of the use of forum non conveniens in admiralty, Alexander Bickel argued that problems with forum shopping should be addressed through formal venue rules instead of the discretionary application of forum non conveniens by trial judges. Alexander Bickel, *The Doctrine of Forum Non Conveniens as Applied in Federal Courts in Matters of Admiralty*, 35 CORNELL L.Q. 12, 16-19 (1949).

13. See Hon. Bernard S. Meyer, *Symposium: The Appellate Judiciary — Its Strengths, Its Woes, and Some Suggestions for Reform: Justice, Bureaucracy, Structure, and Simplification*, 42 MD. L. REV. 659, 660-61 (1983); Warren E. Burger, *Isn't There a Better Way?*, 68 A.B.A. J. 274, 275-76 (1982) (criticizing the trend of increasing litigation). One commentator notes:

The root causes of this increased pressure on the judiciary are many: the decline of public confidence in institutions, both public and private, the loss of the sense of community which follows megalopolitan growth, the increase in the number of lawyers, the advent of public interest law groups, judicial activism, and the tendency of legislative bodies to enact laws that increase court business

Meyer, *supra*, at 660 (citations omitted).

14. Stein, *supra* note 3, at 784-85.

15. Spencer W. Waller, *Bringing Meaning to Interest Balancing in Transnational Litigation*, 23 VAND. J. TRANSNAT'L L. 925, 948 (1991).

16. Comity, in its most basic sense, refers to a respect and consideration for foreign law and state interests which is grounded in notions of sovereignty and reciprocity. It is a broadly defined doctrine which may require the court to enforce a foreign judgment or defer jurisdiction over a case that may more appropriately be decided under foreign law in a foreign forum. The precise definition of comity is

been associated with public interest factors.¹⁷ In particular, it

unclear. For a description of its many interpretations and applications, see Paul, *supra* note 11, at 1 nn.1-18 and accompanying text.

Ulrich Huber, one of the first scholars to articulate principles of comity, argued that despite the limits of territoriality, "those who govern the state must act with comity so that the laws of another state which have been applied within its frontiers maintain their force everywhere, so long as no prejudice results to the power or rights of another sovereign or his [sic] citizens." EUGENE F. SCOLES & PETER HAY, *CONFLICTS OF LAWS* 9 (1984) (citing *De Conflictu Legum*, in ULRICH HUBER, *PRAELECTIONES JURIS ROMANI ET UODIERNI* (1689)).

Huber's work also influenced American courts and conflict-of-laws theory as it was developed in the first comprehensive treatise. JOSEPH STORY, *COMMENTARIES ON THE CONFLICTS OF LAWS, FOREIGN AND DOMESTIC* (1834). Story explained the justification for the application of the law of another state:

The true foundation on which the administration of international law must rest is that the rules which are to govern are those which arise from mutual interest and utility, from a sense of the inconvenience which would result from a contrary doctrine, and from a spirit of moral necessity to do justice, in order that justice may be done to us in return.

See SCOLES & HAY, *supra*, § 2.4, at 12 (citing JOSEPH STORY, *COMMENTARIES ON THE CONFLICTS OF LAWS, FOREIGN AND DOMESTIC* § 35, at 34 (1834)). See also Paul, *supra* note 11, at 19-24.

In the United States, the doctrine of comity was first articulated by the Supreme Court in *Hilton v. Guyot*, 159 U.S. 113 (1895). Although this articulation has been the source of historical debate and confusion, this decision implied that comity is at once compelled as an obligation of the courts while it is also discretionary based on the conditions of reciprocity and discretion to decline the application of laws inconsistent with the forum's public policies. See Paul, *supra* note 11, at 8-11.

17. Conflicts-of-laws theory addresses the question of which state's law (domestic or foreign) should be applied where the law of two competing or interested fora are involved in the action. This analysis originated with Story's theory of comity, see *supra* note 16, and has evolved through many divergent perspectives. In the early part of this century, the "vested rights" theory asserted that a right which has been acquired and enforced by another country should be enforced by the foreign forum in which the action is brought. "Thus an act valid where done cannot be called into question anywhere." See SCOLES & HAY, *supra* note 16, § 2.5, at 13-14 (citing JOSEPH H. BEALE, 3 *CASES ON THE CONFLICTS OF LAWS* 517 (1901)). For application in American courts see *Slater v. Mexican Nat'l R.R.*, 194 U.S. 120, 126 (1904) ("[A]s the source of this obligation is the law of the place of the act, it follows that that law determines not merely the existence of the obligation . . . but equally determines its extent."). While this theory was countered by a "local law theory," which opposed extraterritorial application in favor of local law remedies tailored to serve foreign interests, the vested rights theory was adopted by the American Law Institute in the *RESTATEMENT (FIRST) OF CONFLICT OF LAWS* (1934). See SCOLES & HAY, *supra* note 16, § 2.5, at 15.

The *RESTATEMENT (SECOND) OF CONFLICT OF LAWS* (1971) has been a compromise between these previously rigid rules of territoriality and the revolution in

is necessary to consider the respective forums' laws governing discovery and evidence when determining the appropriate forum for disputes which involve subject matter abroad.¹⁸ Access to

choice-of-law theory led by Brainard Currie's "governmental interest" approach and Albert A. Ehrenzweig's *lex-fori* (law of the forum) approach—views which may be seen as forum bias. SCOLES & HAY, *supra* note 16, § 2.5, at 15. The Restatement (Second) provides little clarity among the theoretical developments of the last half-century. It does, however, focus upon the concept of the "most significant relationship" between the competing state's law and the action and lays out six policy considerations:

- (1) the needs and interests of the interstate and international systems, (2) the relevant policies of the interested states including their interests in having their law applied to the particular issue, (3) the protection of party expectations, (4) the basic policies underlying the particular field of law, (5) the objectives of certainty, predictability, and uniformity of result, and (6) the ease of determining and applying the law previously identified as applicable.

RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 cmt. (c) (1971).

These factors are not listed in any particular order of importance, thus allowing courts to emphasize different principles in their choice-of-law determination. Moreover, the Restatement (Second) calls for an issue-by-issue application of this framework (known as "depeçage"); therefore, the characterization of subject matter and legal issues is also a crucial element of the court's analysis. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 142 (1971).

Because this framework assumes the validity of a forum's own choice-of-law rules, which seldom contemplate displacing the deciding forum's own law in favor of another forum, it will frequently lead to the application of the forum's own law. In light of this effect, Ehrenzweig also advocated the use of forum non conveniens to effectuate the needs of the international system. See SCOLES & HAY, *supra* note 16, § 2.7, at 22.

Given the favor toward the forum's law expressed in the theory and results of these theories, each tend to promote "law shopping" through forum shopping. SCOLES & HAY, *supra* note 16, § 2.7, at 23. Therefore, forum non conveniens remains an important instrument to deter this practice and to defer to the forum whose interests are most at stake in any particular action.

Some scholars have argued that this interest-based analysis also violates the privileges and immunities clause and the equal protection clause of the Constitution because it favors citizens of forum states. See e.g., John H. Ely, *Choice of Law and the State's Interest in Protecting Its Own*, 23 WM. & MARY L. REV. 173, 180-81 (1981); Mark P. Gergen, *Equality and True Conflict of Laws*, 73 IOWA L. REV. 893, 893-94 nn. 1-10 and accompanying text. Recent United States Supreme Court decisions reflect this bias of the interest-based analysis toward forum citizens. Some commentators also assert that an interest-based choice-of-law analysis also unfairly favors forum citizens in the forum non conveniens determination. See Jeremy D. Morley, *Forum Non Conveniens: Restraining Long Arm Jurisdiction*, 68 NW. U. L. REV. 24, 42 (1973).

18. The application of comity principles in private international law adjudication

evidence and witness testimony have traditionally been treated separately from overall comity issues, but these "private interests" should be scrutinized in light of the restrictive discovery procedures applied by most jurisdictions outside of the United States.¹⁹ Extraterritorial application of the extraordinarily liberal discovery policy embodied in our own Federal Rules of Civil Procedure may be not only impracticable, but also may invade the judicial control of discovery in foreign jurisdictions and create international tensions.²⁰

International policy considerations also play a role in the initial articulation of private and public interests in forum non conveniens analysis.²¹ Although the court applies the forum non

is a practice largely exclusive to the United States. Most common-law or civil-law courts do not apply such principles outside of questions of sovereignty or public international law, despite the notion of comity as customary international law. See Paul, *supra* note 11, at 27-40 (comparing the use of comity in the United States to that of civil-law, socialist and other common-law nations).

19. The Federal Rules of Civil Procedure provide a much broader scope of permissible discovery than that of most countries, especially civil-law countries like India, the alternative forum for *R. Maganlal & Co. v. M.G. Chemical Co.*, 942 F.2d 164 (1991). For an extensive discussion of the methods for obtaining discovery abroad and obstacles confronted in such efforts, see Sharon Devine & Christine M. Olsen, *Taking Evidence Outside the United States*, 55 B.U. L. REV. 368 (1975).

In civil-law countries, discovery is conducted before a judge who gathers most of the evidence in a continuous series of hearings. See Boyce, *supra* note 1, at 201 n.45.

Furthermore, in India, a party must first obtain a court order before seeking inspection of an adversary's documents. Boyce, *supra* note 1, at 201 n.51, (citing INDIA CODE CIV. PROC., Order 11, Rule 12). Therefore, discovery is necessarily limited by the court's own discretion.

20. GARY B. BORN & DAVID WESTIN, *INTERNATIONAL CIVIL LITIGATION IN UNITED STATES COURTS: COMMENTARY AND MATERIALS* 261, 278-84 (1989).

Resistance to the extraterritorial application of U.S. discovery procedures is evinced by the recent trend in foreign "blocking statutes" that impose sanctions on the disclosure of certain information. Increasing the tensions between liberal American discovery procedures and those of more restrictive nations, U.S. courts have tended to override these statutes where the evidence sought is reasonably relevant. See generally Paul A. Batista, *Confronting Foreign Blocking Legislation: A Guide to Securing Disclosure From Non-resident Parties to American Litigation*, 17 INT'L LAW. 61 (1983).

21. The courts must frequently resolve legal questions regarding which jurisdiction has the most significant relationship to the controversy. Stein, *supra* note 3, at 814.

conveniens balancing test to the isolated context of the controversy immediately before the bench, there are frequently overriding concerns of foreign law and policy not raised in the complaint. In the area of international commercial transactions, public and private law are meshed in a complex web of international treaties, customs and regulatory law, as well as the private law of the transaction itself. As a result, courts are frequently faced with complicated choice-of-law and choice-of-forum questions. Forum non conveniens offers a practical alternative to the application of these burdensome and ambiguous doctrines which have been criticized for their indiscriminate application and resulting expansion of extraterritorial jurisdiction.²²

By addressing the burdens upon both the parties and the court, in addition to competing national interests, forum non conveniens balances the question of jurisdiction in concrete and practical terms. Forum non conveniens calls for dismissal where the conflicts-of-law analysis appears overly burdensome²³ and serves as a discretionary means of acknowledging competing foreign interests²⁴ that are not necessarily considered "true con-

22. Waller, *supra* note 15, at 940-47.

23. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 509 (1947).

24. Given the discretionary nature of the forum non conveniens doctrine, the contours of an appropriate interest analysis are unclear. There is an interest in deciding local controversies at home, an interest in deciding the controversy in a forum familiar with the applicable law, and an interest in avoiding the application of foreign law. However, the forum state's competing governmental interest in the action is also implicit in these considerations. The concept of governmental interest has been articulated in Brainard Currie's two-step, choice-of-law analysis. First, the court interprets the forum's law to determine what economic, social, or administrative governmental interest it expresses. Then, the court analyzes the state's relationship to the litigation to determine whether the application of the law in question would effectuate that policy. If the policy is effectuated by the law in question, the government has an interest in having its law applied in a given case. See Brainard Currie, *The Constitution and the Choice of Law: Governmental Interest and Judicial Function*, 26 U. CHI. L. REV. 9, 9-10 (1958).

This analysis is proposed in the context of conflicts-of-law doctrine; however, the interests of a competing forum and its relationship to the action may, and arguably should, be a factor in the determination of forum non conveniens dismissals. See Harry Litman, *Considerations of Choice of Law in the Doctrine of Forum Non Conveniens*, 74 CAL. L. REV. 565, 570-71 (1986); Boyce, *supra* note 1.

flicts" of law.²⁵ As such, the doctrine serves as an alternative means of narrowing jurisdiction and militating against the international tensions that arise from United States interference in controversies involving foreign state interests.

The purposes of forum non conveniens as a critical doctrine in international law have been overlooked and thwarted in the United States Court of Appeals for the Second Circuit's decision in *R. Maganlal & Co. v. M.G. Chem. Co., Inc.*²⁶ In this breach of contract action by an Indian plaintiff against a United States defendant for damages allegedly arising out of the delivery of non-conforming goods to India, the Second Circuit overturned the district court's forum non conveniens dismissal and diverted its analysis from serious issues of foreign law and access to evidence abroad raised by the defendant.

This Comment will address the important role of forum non conveniens in limiting access to United States courts in light of the Second Circuit's protective attitude towards foreign plaintiffs. The position that forum non conveniens should be abolished altogether has been argued by Justice Oakes in his vehement dissents to forum non conveniens dismissals.²⁷ As the Sec-

25. The notion of true versus false conflicts was developed by Brainard Currie. Currie's view recognizes that every state has a "governmental interest" in the policies upon which its laws are founded. Thus, in making a choice of law, the court must look to the policies expressed by the law and the reasonableness of the forum state in applying such policies. In this analysis, a "true conflict" exists only when both laws in question are *directly relevant* and the purposes of each call for its application in the particular action. See SCOLES & HAY, *supra* note 16, § 2.6, at 17-18. If the forum's law cannot be tailored to meet the interest of each state, then Currie's analysis calls for the application of the law of the forum. See, e.g., *Lilenthal v. Kaufman*, 395 P.2d 543 (Or. 1962). In fact, then, the law of the forum would be applied in all cases except those where the forum found itself to be "disinterested." In this case, the doctrine of forum non conveniens should be applied. See SCOLES & HAY, *supra* note 16, § 2.6, at 19.

A "false conflict" exists when the potentially applicable laws do not differ, either in form or purpose, or one of the laws is not intended to apply to the case at hand. If the application of one state's law would advance that law's policy, while the non-application of the other state's law would not defeat that state's policy interests, there is a false conflict based on policy. See SCOLES & HAY, *supra* note 16, § 2.6, at 17-19. See, e.g., *Alabama Great S. R.R. Co. v. Carroll*, 11 So. 803 (Ala. 1892).

26. *R. Maganlal & Co. v. M.G. Chem. Co., Inc.*, No. 91-7085, 1990 U.S. Dist. LEXIS 16385 (S.D.N.Y. Dec. 9, 1990), *rev'd*, 942 F.2d 164 (2d Cir. 1991).

27. See *Fitzgerald v. Texaco, Inc.*, 521 F.2d 448, 456 (2d Cir. 1975) (Oakes, J.,

ond Circuit has narrowed its position on forum non conveniens, it has moved closer to his extreme views. The Court of Appeals' recent reversal in *R. Maganlal & Co. v. M.G. Chem. Co.*,²⁸ demonstrates the solidification of the Second Circuit's resistance to forum non conveniens and its protection of foreign plaintiffs through expansive notions of the United States' "local interest."²⁹

This Comment will analyze the Court of Appeal's perfunctory treatment of these issues and explore the implications of the court's application of forum non conveniens to international business transactions. Parts I and II will survey the background of forum non conveniens and the *Maganlal* case. Part III will then analyze the decision in light of the appropriate role of forum non conveniens in international litigation and the Second Circuit's resistance to dismissal. Finally, this comment will con-

dissenting) (footnotes omitted):

The almost 30 years that have elapsed since *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947), and *Koster v. Lumbermans Mut. Casualty Co.*, 330 U.S. 518 (1947), have seen such an extraordinary development of worldwide economical air travel by jet that the deposing of witnesses abroad or bringing them to the United States is a relatively simple and inexpensive matter in a suit of this size. In other words, in the year 1975 no forum is as inconvenient as it was in 1947. One may wonder whether the entire doctrine of forum non conveniens should not be reexamined in the light of the transportation revolution that has occurred since then.

Judge Oakes later argues in his dissent in *Alcoa Steamship Co. v. M/V Nordic Regent*, 654 F.2d 147, 164-65 (2d Cir. 1978) (en banc), cert. denied, 449 U.S. 890 (1980), that a limitation upon or denial of recovery is, in and of itself, a ground for not dismissing on the basis of forum non conveniens, sharply criticizing the standards for dismissal laid out in *Piper Aircraft Co.*, 454 U.S. 235 (1982).

In a rare concurrence with a majority decision to dismiss on forum non conveniens, Judge Oakes qualified his agreement on the basis of a forum selection clause favoring the foreign forum, and reiterated his previous dissenting views. *Overseas Nat'l Airways, Inc. v. Cargolux Airline Int'l, S.A.*, 712 F.2d 11, 14 (2d Cir. 1983) (Oakes, J., concurring).

28. *R. Maganlal & Co. v. M.G. Chem. Co.*, No. 91-7085, 1990 U.S. Dist. LEXIS 16385 (S.D.N.Y. Dec. 9, 1990), rev'd, 942 F.2d 164 (2d Cir. 1991).

29. The *Maganlal* court did not, in fact, carry out any type of formal interest analysis inasmuch as it completely failed to address the potential choice of law issues. As this note will argue, this was one of the court's most serious omissions which led, in part, to an improper balancing process under the forum non conveniens analysis.

clude that the Second Circuit's protective approach toward foreign plaintiffs defeats the purpose of forum non conveniens and perpetuates an expansion of extraterritorialism that violates principles of comity and judicial economy.

II. BACKGROUND AND PURPOSE OF THE FORUM NON CONVENIENS DOCTRINE

A. Introduction

Forum non conveniens originated in English and Scottish courts³⁰ as an equitable exception to the mandates of jurisdiction when the controversy poses such inconvenience and burden that it is more appropriately tried in an alternative forum.³¹ In the United States, Justice Jackson articulated the premise in *Gulf Oil Corp. v. Gilbert*,³² a tort action brought by a Virginia warehouse owner against a Pennsylvania corporation for damages arising out of an accident in Virginia that resulted from the defendant's negligence.³³ Writing for the majority, Justice Jackson stated, "the principle of forum non conveniens is simply that courts may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of general venue statutes."³⁴

30. See *Logan v. Bank of Scotland* [1906] 1 K.B. 141 (Eng.) (leading British case); *Clements v. McKaulay*, 1866 Sess. Cas. M. 583 (Scot.). See also ANDREW DEWAR GIBB, *THE INTERNATIONAL LAW OF JURISDICTION IN ENGLAND AND SCOTLAND* 220-30 (1926).

31. See 15 WRIGHT ET AL., *supra* note 2, at § 2828. See also Stein, *supra* note 3, at 796-97 and accompanying notes. The doctrine emerged in Scotland and England at around the turn of the century, but the United States federal courts did not formally adopt the doctrine until 1948, when the Supreme Court formulated the American doctrine in two seminal cases: *Koster v. Lumberman's Mut. Casualty Co.*, 330 U.S. 518 (1947), and *Gulf Oil*, 330 U.S. 501.

For a comparative discussion of the application of forum non conveniens in the United States and abroad, see Stein, *supra* note 3, at 796-98.

32. 330 U.S. 501 (1947).

33. *Id.* at 502. Gilbert alleged that the fire that damaged his warehouse in Virginia was caused by the defendant's negligence in the delivery of gasoline. *Id.* at 502, 509-12.

34. *Id.* at 507. The doctrine had surfaced earlier in state courts, partly in response to the misuse of the less stringent venue rules for changing forums.

The Court came to a similar conclusion in the sister case to *Gulf, Koster v. Lumberman's Mut. Casualty*.³⁵ *Koster* involved a stockholder's derivative action brought in the Eastern District of New York by a state resident against a nominal corporate defendant representing an Illinois corporation.³⁶ In both of these suits, the transaction giving rise to the suit occurred in the alternate forum and could have potentially been governed by that forum's law. Moreover, all of the relevant evidence and witnesses in each case were outside the jurisdiction of the chosen forum and in the alternative state where the action could have been brought. Thus, adjudication in the chosen forums would have burdened the court with tedious conflicts-of-law analysis and created undue inconvenience and expense for the defendants.

These cases marked the first acceptance of forum non conveniens in United States federal courts and the application of a balancing test that entailed both these private and public interest factors. In only a few decades, the forum non conveniens doctrine has flourished in response to the international popularity of American courts. The original balancing test has now expanded to incorporate the interests of foreign parties and the propriety of United States jurisdiction over matters essentially outside its own national territory.³⁷

United States federal courts have never been willing to catalogue the circumstances which would require either the

Many of the states have met misuse of venue by investing courts with a discretion to change the place of trial on various grounds, such as the convenience of witnesses and the ends of justice. The Federal Law contains no such express criteria to guide the district court in exercising its power. But the problem is a very old one affecting the administration of the courts as well as the rights of litigants, and both in England and in this country the common law worked out techniques and criteria for dealing with it.

Id. (citing *Logan v. Bank of Scotland*, [1906] 1 K.B. 141 (Eng.)); *cf.* *La Société du Gaz de Paris v. La Société Anonyme de Navigation "Les Armateurs Français,"* 1926 Sess. Cas. (H.L.) 13 (Scotland).

35. 330 U.S. 518 (1947).

36. *Koster*, 330 U.S. at 518-19.

37. See *supra* note 2. See also Stein, *supra* note 3, at 803-05; Waller, *supra* note 15.

grant or dismissal of forum non conveniens;³⁸ however, the general principles laid out in both *Koster* and *Gulf* have been formalized in the historical application of forum non conveniens. The "ultimate inquiry" employed by the Supreme Court in *Koster v. Lumbermen's Mut. Casualty Co.*³⁹ asked "where [the] trial will best serve the convenience of the parties and the ends of justice."⁴⁰ In a more refined analysis, the *Gulf* court emphasized the discretionary and fact-based nature of the forum non conveniens determination,⁴¹ while also laying out specific factors which indicate burdensome inconvenience to the defendant and "make a trial [in the chosen forum] inappropriate because of . . . administrative and legal problems."⁴² These factors are traditionally analyzed within the balancing test of competing private and public interests.⁴³

B. Private Interest Factors

The private interest factors affect the convenience of the parties and are focused on a standard that forbids harassment or undue burden to the defendant. They include: (1) the ease of access to sources of proof; (2) the availability of compulsory process for the attendance of unwilling witnesses; (3) the cost of obtaining the attendance of willing witnesses; (4) the feasibility of viewing the premises or evidence in question; and, (5) all other practical problems that make trial of the case easy, expeditious, and inexpensive.⁴⁴ In *Gulf*, most of the witnesses and any remaining physical evidence from the disaster remained in Virginia, the site of the accident.⁴⁵ Similarly, in *Koster*, the

38. *Gulf*, 330 U.S. at 501 (court does not accord dispositive weight to any one factor). *But see* Lacey v. Cessna Aircraft Co., 932 F.2d 170, 182-83 (2d Cir. 1991) (some factors are more equal than others).

39. 330 U.S. 518 (1947).

40. *Id.* at 527.

41. *Gulf*, 330 U.S. at 508.

42. *Koster v. Lumberman's Mut. Casualty*, 330 U.S. 518, 524 (1947).

43. *Gulf*, 330 U.S. at 508-09. *See also* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 241 (1981) (further enumerating the relevant public and private interest factors).

44. *Gulf*, 330 U.S. at 508.

45. *Id.* at 503.

defendant's corporate records and any potential witnesses were outside the forum state in Illinois, the corporation's principal place of business.⁴⁶ Furthermore, in neither case did the plaintiffs make any legitimate showing that the chosen forum served their own convenience.⁴⁷ Faced with these facts, the court concluded in both instances that the plaintiffs' choice of forum only served to burden the defendant unfairly—a conclusion which weighed most heavily in dismissal.⁴⁸

Although practicability and convenience have been the centerpiece of this analysis, among the list of factors to be weighed the *Gulf* Court also noted that the forum must not be selected by the plaintiff to "vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy."⁴⁹ The Court's interests in justice, therefore, are primarily articulated as safeguards for the defendant in the process of forum selection and designed to prevent excessive burdens or the impairment of her substantive rights by procedural inconvenience.

C. *Public Interest Factors*

The public interest factors employed in the forum non conveniens analysis concern the interest of the court itself and the state's public interest in adjudicating localized controversies at home. These interests include: (1) administrative difficulties flowing from congestion of the courts; (2) the local interest in resolving localized controversies at home; (3) having the trial of a diversity case in a forum that is familiar with the law that must govern the action; (4) the avoidance of unnecessary problems in conflicts of law or in application of foreign law; and, (5) the unfairness of burdening citizens in an unrelated forum with jury duty.⁵⁰ In *Gulf*, these concerns were reflected in the

46. *Koster*, 330 U.S. at 519-21.

47. *Gulf*, 330 U.S. at 509-11; *Koster*, 330 U.S. at 531.

48. *Gulf*, 330 U.S. at 511-12; *Koster*, 330 U.S. at 531-32.

49. *Gulf*, 330 U.S. at 508.

50. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981); *Gulf*, 330 U.S. at 508-09.

Court's reluctance to engage in unnecessary conflicts-of-law analysis and apply the law of another state where the action could have been brought.⁵¹ Similarly, the Court in *Koster* recognized that the alternate forum state had a far greater interest in the controversy which merited the expenditure of resources and made the state a more appropriate forum.⁵² Particularly in *Koster*, the Court questioned the ability of an out-of-state court to exert the necessary control over a foreign corporation to inspect the evidence and potentially enforce a judgment.⁵³ While both of these cases were dismissed to other states within the United States, the forum non conveniens interest analysis continued to be developed in later cases involving international disputes.⁵⁴

D. Adequate Alternative Forum

The unusual willingness to challenge the plaintiff's choice of forum reflects the Court's concern that the relative advantages of a particular forum's procedural and substantive law might prompt plaintiffs to select forums that are inconvenient to the parties and the trial process.⁵⁵ This concern is also related to

51. *Gulf*, 330 U.S. at 509, 511-12; See also *Piper*, 454 U.S. at 257.

52. *Koster*, 330 U.S. at 526.

53. *Id.* at 530-31.

54. See, e.g., *Piper*, 454 U.S. at 235 (developing the theory of adequate alternative forum and applying a lesser standard of deference to foreign plaintiffs choice of forum); *Manu Int'l, S.A. v. Avon Prods. Inc.*, 641 F.2d 62 (2d Cir. 1981) (holding that under a forum non conveniens analysis, a party's contacts with the forum are only relevant insofar as they relate to the ease and fairness of trying a case); *Schertenleib v. Traum*, 599 F.2d 1156 (2d Cir. 1978) (dismissing on forum non conveniens grounds even where there was no alternative forum in which the plaintiff could have commenced the action); *Olympic Corp. v. Société Générale, A/S*, 462 F.2d 376 (2d Cir. 1972) (dismissing on forum non conveniens grounds where third party complainant was a foreign corporation, all relevant transactions took place in France, French law applied, and all witnesses were in France).

55. *Gulf*, 330 U.S. at 507. At the time of the *Gulf* decision, forum shopping was constrained by the pervasive application of the *lex loci* approach to choice-of-law questions which applies the law of the place where the action arose. See, e.g., *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308 n.11 (1934). The problem of forum shopping has increased as the application of choice-of-law rules has shifted from the *lex loci* test to a more expansive interest analysis which is determined by the

the simple fact that the desirable aspects of the American legal system have attracted a flood of litigation that overcrowds the courts.⁵⁶ Therefore, if the chosen forum is otherwise inconvenient, the plaintiff's pursuit of the most favorable law does not preclude dismissal.⁵⁷ This rule has also been articulated in the Supreme Court's definition of an "adequate alternative forum." In *Gulf*, the Court stated that dismissal on the grounds of forum non conveniens would not be considered unless an alternate forum was available.⁵⁸ This provision required that the forum court in question have subject matter jurisdiction over the case, personal jurisdiction over the parties, and that the suit not be precluded by a statute of limitations.⁵⁹

The issue of forum shopping is of particular relevance to litigation involving foreign plaintiffs who frequently select Unit-

forum's own articulation of an interest in the controversy. See Stein, *supra* note 3, at 816 n.152. See generally Harold L. Korn, *The Choice-of-Law Revolution: A Critique*, 93 COLUM. L. REV. 772 (1983) (providing a history of choice-of-law analysis over the last 50 years).

56. See *supra* note 1.

57. The same logic applies to the use of forum non conveniens by defendant as a means of reverse forum shopping. See *Kloechner Reederi und Kohlenhandel v. A/S Hakedal*, 210 F.2d 754, 757 (2d Cir.), *cert. dismissed by stipulation*, 348 U.S. 801 (1954) (defendant not entitled to dismissal on the grounds of forum non conveniens solely because the law of the original forum is less favorable to him than the laws of the alternative forum).

In *Piper*, this rule was developed further when the Supreme Court held that the possibility of an unfavorable change in substantive law should not be given conclusive or even substantive weight in deciding whether to dismiss based upon forum non conveniens grounds. *Piper*, 454 U.S. at 247. Cf. *Holmes v. Syntex Labs., Inc.*, 202 Cal. Rptr. 773, 779 (Ct. App. 1984) (holding that California courts must consider the possibility that the law of the alternative forum may be less favorable to the plaintiff when determining whether the alternative forum is "suitable").

58. *Gulf*, 330 U.S. at 507 (the doctrine of forum non conveniens necessarily presupposes the existence of at least two forums in which the defendant is amenable to service of process). In the alternative, the courts have dismissed on the grounds of forum non conveniens conditioned upon the defendant's consent to jurisdiction, see generally *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* December 19, 1984, 643 F.2d 842 (2d Cir.), *aff'd with modification*, 809 F.2d 195 (2d Cir. 1987), *cert. denied*, *Executive Comm. Members v. Union of India*, 404 U.S. 871 (1987), and the acceptance of the case by the alternate forum, *Calavo Growers v. Belgium*, 632 F.2d 963, 968 (2d Cir. 1980).

59. See *supra* note 57. See also ROBERT C. CASAD, *JURISDICTION AND FORUM SELECTION* § 4:23 (1983).

ed States courts for their broader discovery procedures, progressive law, liberal remedies, the unusual availability of a jury trial, and the possibility of obtaining counsel on a contingency fee basis.⁶⁰ Almost thirty years after *Gulf*, the Supreme Court faced this issue in *Piper Aircraft Co. v. Reyno*.⁶¹ In *Piper*, the Court reversed the Third Circuit's decision⁶² and affirmed the district court's *forum non conveniens* dismissal of a wrongful death action brought on behalf of Scottish citizens against a Pennsylvania aircraft manufacturer for damages arising out of an air crash overseas. Once the Court found that the private and public interest factors favored dismissal, it addressed the argument that the alternative forum denied the plaintiff a more favorable remedy under the American doctrine of strict liability. The Court reasoned that if comparative advantages of substantive law were a consideration, the purpose and utility of *forum non conveniens* as a means of avoiding burdensome choice-of-law analysis would be defeated.⁶³ Accordingly, the Court held that unless the alternative forum precluded any meaningful relief whatsoever, its jurisdictional competence rendered it a sufficient alternative for consideration.

The Supreme Court has clearly stated that the existence of an "adequate forum" does not require that the law be as favorable or liberal as that of the American legal system, "lest the United States become a court for the world."⁶⁴ Although *Piper* was a blow to foreign tort plaintiffs seeking the protection of favorable United States laws, the Court did not radically alter the overall balancing test articulated in *Gulf*. Regardless of the issue of forum shopping, the Supreme Court still maintains the principle that "unless the balance [of inconvenience] is strongly in favor of the defendant, the plaintiff's choice of forum should not be disturbed."⁶⁵

60. See *Piper*, 454 U.S. at 252 n.18.

61. 454 U.S. 235 (1981).

62. *Reyno v. Piper Aircraft Co.*, 630 F.2d 149 (3d Cir. 1990).

63. *Piper*, 454 U.S. at 257 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511-12 (1947)) (which proposed *forum non conveniens* as a means of avoiding complex choice-of-law analysis).

64. *Duque*, *supra* note 4, at 380. See also *Piper*, 454 U.S. at 254-56 n.22.

65. *Gulf*, 330 U.S. at 508. See also *Lacey v. Cessna Aircraft Co.*, 932 F.2d 170,

E. Standard of Deference Accorded to Foreign Plaintiffs

Despite the presumption in favor of a plaintiff's choice of forum, foreign plaintiffs are accorded a lower standard of deference in the forum non conveniens analysis. The *Piper* Court was the first to articulate this standard by affirming the district court's differential treatment of a foreign versus a citizen plaintiff.⁶⁶ The Court relied upon its previous argument in *Koster v. Lumberman's Mut. Casualty Co.*⁶⁷ that the deference given to a plaintiff suing in her home forum was reasonable based on the assumption that such a forum was convenient.⁶⁸ The *Piper* Court reasoned that "when the plaintiff is foreign, however, this assumption is much less reasonable" in light of the inconveniences of litigating away from home and outside of the forum where the occurrence took place and the evidence is located.⁶⁹ Thus, the Court concluded that "[b]ecause the central purpose of any forum non conveniens inquiry is to ensure that the trial is convenient, a foreign [resident] plaintiff's choice deserves less deference."⁷⁰

The *Piper* Court also discussed the relevance of applying foreign law within the forum non conveniens analysis. In *Piper*, the issue of which forum's law would apply to which defendant was left unresolved on the grounds that the doctrine of forum

180 (3d Cir. 1991) (citing *In re Air Crash Disaster Near New Orleans, La.*, On July 9, 1982, 821 F.2d 1147, 1164 n.26 (5th Cir. 1987)) (en banc), *vacated on other grounds*, 490 U.S. 1032 (1989) (factors favoring dismissal must be more than equal, they must be decidedly in favor of defendant's forum).

66. *Piper*, 454 U.S. at 255.

67. 330 U.S. 518 (1947).

68. *Id.* at 524.

69. *Piper*, 454 U.S. at 255-56 nn.23-24. See also *Pain v. United Technologies Inc.*, 637 F.2d 775, 797-98 (D.C. Cir. 1980); *Lacey*, 932 F.2d at 178-79 (court may accord less deference to foreign plaintiff, but court must articulate what weight this deference carries in its analysis).

It should be noted that the distinction between foreign and citizen plaintiffs was not based on the states' lesser interest in providing a remedy for foreign plaintiffs, but simply on the reasonableness of the plaintiffs' choice of forum. See *Piper*, 454 U.S. at 256-57.

70. *Piper*, 454 U.S. at 256.

non conveniens was designed to obviate such complex analysis.⁷¹ However, the Court did state that the possibility of having to apply law foreign to the forum, although insufficient in and of itself to warrant dismissal,⁷² was a factor favoring dismissal where other facts demonstrated the inconvenience of the forum.⁷³ The Court recognized that the injured parties were all Scottish, the evidence was located overseas, and the accident occurred on Scottish soil. These factors all reflected Scotland's greater interest over the controversy and the regulation and compensation of injuries to its citizens.⁷⁴ Therefore, even assuming that United States law might apply,⁷⁵ the Court reasoned that the foreign sovereign's interest would still outweigh the interest of the United States in applying its own law.⁷⁶

F. Conclusion

The *Piper* decision contributed greatly to the forum non conveniens doctrine in the context of international litigation by addressing issues of foreign law and circumstances which militate against affording foreign plaintiffs deference. As in *Gulf* and *Koster*, the Court's reasoning discourages federal courts from protectively preserving jurisdiction. Each of these decisions calls for the use of forum non conveniens as a means of avoiding entanglement in foreign law and objectively addressing the motives and consequences of adjudicating controversies that are more significantly related to an alternate forum.

71. *Id.* at 251.

72. *See* *Founding Church of Scientology of Washington, D.C. v. Verlag*, 536 F.2d 429, 436 (D.C. Cir. 1976).

73. *Piper*, 454 U.S. at 260 n.29 (citing cases which held that the need to apply foreign law favors dismissal).

74. *Id.* at 237.

75. The district court in *Piper* had already determined through a conflicts-of-law analysis that foreign law would control a large part of the case; however, the Court of Appeals disagreed, finding Ohio and Pennsylvania to be the states with the greatest interest. *Piper*, 630 F.2d 149, 168, 170-71 (3d Cir. 1981), *rev'd on other grounds*, *Reyno v. Piper Aircraft Co.*, 454 U.S. 235 (1984). The Supreme Court did not find it necessary to resolve this issue in light of other factors which weighed heavily in favor of dismissal.

76. *Piper*, 454 U.S. at 260-61. *See also* *Duque*, *supra* note 4, at 394.

III. BACKGROUND OF THE CASE

A. *Facts*

In *R. Maganlal & Co. v. M.G. Chem. Co., Inc.*, the Second Circuit reversed the district court's dismissal and denied the defendant's motion for dismissal based on forum non conveniens.⁷⁷ The dispute between the plaintiff, R. Maganlal & Company, a purchaser located in India, and the defendant, M.G. Chemical Company, Inc., a New York corporation, arose out of a contract for the sale of 200 metric tons of "off-specs" low density polyethylene (LDPE), an intermediate standard plastic used in the manufacture of plastic film.⁷⁸ The defendant purchased the LDPE from Dupont, a Delaware corporation which primarily manufactures virgin materials.⁷⁹ Because Dupont's off-spec materials did not meet industry standards for LDPE, Dupont's products were purchased for a fraction of the cost of prime virgin material.⁸⁰ Both the contract for sale and the amended letter of credit⁸¹ specified that the LDPE was to be off-specs.⁸²

As per the terms of the contract, M.G. shipped the goods from Houston, Texas to Maganlal at the Indian Port of Kandla

77. *R. Maganlal & Co. v. M.G. Chem. Co.*, No. 91-7085, 1990 U.S. Dist. LEXIS 16385 (S.D.N.Y. Dec. 5, 1990), *rev'd*, 942 F.2d 164, 169 (2d Cir. 1991).

78. Brief for Appellee at 1-2, 9, *R. Maganlal & Co. v. M.G. Chem. Co.*, No. 91-7085, 1990 U.S. Dist. LEXIS 16385 (S.D.N.Y. Dec. 5, 1990), *rev'd*, 942 F.2d 164 (2d Cir. 1991) [hereinafter Appellee's Brief].

79. *Id.*

80. *Id.* at 2.

81. The actual negotiation of the purchase was performed by Kanu Patel on behalf of Pantry Shelf Food Corporation and Dhimeet Limited which are both corporations of Ontario, Canada and neither of which were parties to the case between Maganlal and M.G. The final contract was signed in New York on September 16, 1987 and specified that the goods were to be off-specs and shipped directly to Maganlal in India. The agreement was confirmed by Dhimeet Limited on September 16, 1987 by a letter of credit. The letter of credit was issued by the Bank of Credit & Commerce in Toronto and did not specify off-specs. It was amended to this effect on September 22, 1987 at the defendant's insistence. *Maganlal*, No. 91-7085, 1990 U.S. Dist. LEXIS 16385, at *1. Although the defendant initially disputed ordering off-specs goods, the plaintiff later conceded on this issue. *Id.* at *1 n.1.

82. Appellee's Brief, *supra* note 78, at 2.

on October 19, 1987, and received payment pursuant to the letter of credit.⁸³ Upon arrival, however, the goods were seized by Indian customs officials as "contraband." Both the District Court for the Southern District of New York and the Second Circuit Court of Appeals noted that it was "unclear whether the shipment was seized because the plaintiff (Maganlal) was not licensed to receive "off-specs" goods or because the goods were adulterated in that they did not meet the industry standard for LDPE."⁸⁴ However, at the time of the shipment, Indian law did not permit the importation of disposal or off-specs goods and only allowed prime virgin material to pass through customs.⁸⁵

After the goods were seized and detained by the government, Maganlal contacted M.G. and asserted that the goods were non-conforming due to the high water and waste content, even though no such specifications were made in the contract in regard to off-spec goods.⁸⁶ M.G. did not respond, and Maganlal subsequently filed a suit for breach of contract in the Southern District of New York. The defendant's motion for dismissal on the grounds of forum non conveniens was granted by the district court.⁸⁷ Maganlal appealed and the Court of Appeals for the Second Circuit reversed the dismissal.⁸⁸

83. See Appellee's Brief, *supra* note 78, at 1-2, 9.

84. *R. Maganlal & Co. v. M.G. Chem. Co.*, No. 91-7085, 1990 U.S. Dist. LEXIS 16385, at *2 (S.D.N.Y. Dec. 5, 1990), *rev'd*, 942 F.2d 164 (2d Cir. 1991).

85. Appellee's Brief, *supra* note 78, at 2.

86. The district court rejected the plaintiff's argument that the contract called for the application of the U.C.C. requirements for "Final Offer." *Maganlal*, No. 91-7085, 1990 U.S. Dist. LEXIS 16385, at *6 n.3.

87. The defendant originally moved for dismissal based on 28 U.S.C. § 1404(a) (1982), which governs change of venue motions in federal court. This provision does not entail a change of law and has a more liberal standard of application than forum non conveniens. See *Van Dusen v. Barrack*, 376 U.S. 612, 639 (1964). The *Maganlal* court determined that the "Second Circuit has expressly rejected the contention that rules governing transfers pursuant to 1404(a) also govern forum non conveniens dismissal." *Maganlal*, 1990 U.S. Dist. LEXIS 16385, at *2 (citing *Schertenleib v. Traum*, 589 F.2d 1156 (2d Cir. 1978)).

88. *Maganlal*, 942 F.2d at 169.

B. *The District Court's Reasoning*

In a brief opinion on the forum non conveniens issue, the district court held that "both the private and public interest in this case weigh heavily in favor of dismissal."⁸⁹ The case was thus dismissed on the condition that defendants consent to Indian jurisdiction and waive any statute of limitations defenses.⁹⁰

Accepting the prior determination of the Second Circuit that India's courts provided an adequate forum for dismissal,⁹¹ the district court applied the balancing test of private and public interest factors first articulated in *Gulf*.⁹² The private interest factors addressed by the court included the location of evidence and witnesses in India and the burden that this location placed on the defendant. The court's analysis of public interest factors related to its reluctance to adjudicate issues of foreign law that required documentation and verification of Indian customs regulation and to weigh the competing interest of the foreign forum.

In particular, the court focused on the two factual disputes raised by the breach claim, the first of which was whether the defendant's goods met the standard of off-spec LDPE.⁹³ This inquiry required evidence of industry standards available in the United States and access to goods located in India. The court found that the potential need for non-party United States witnesses did not preclude dismissal,⁹⁴ but still determined that the location of the goods outside of the United States jurisdiction

89. *Maganlal*, No. 91-7085, 1991 Dist. LEXIS 16385, at *7-9.

90. *Id.* at *7-8. The court also asserted that if the Indian government refused to exercise jurisdiction or defendants failed to comply with the conditional grant, the plaintiff could move to the District Court of the Southern District of New York to restore the action. *Id.* at *8.

91. See *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* on December 19, 1984, 809 F.2d 195, 198-99 (2d Cir. 1987).

92. *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947).

93. *Maganlal*, No. 91-7085, 1991 Dist. LEXIS 16385, at *5-6.

94. *Id.* at *7 (citing *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India* on December 19, 1984, 809 F.2d 195 (2d Cir.), *cert. denied*, Executive Comm. Members v. Union of India, 404 U.S. 871 (1987)). See also *Olympic Corp. v. Société Générale*, 333 F. Supp. 121 (S.D.N.Y. 1971), *rev'd in part, aff'd in part*, 462 F.2d 376 (2d Cir. 1972).

constituted a more compelling obstacle to convenient litigation. While the goods had already been tested, the court found the difficulty of obtaining further testing a significant burden to the defendant in his efforts to rebut central issues in the case.

The district court then addressed the second factual dispute, the relevance of the scope of the plaintiff's import permit, and concluded that the "[r]esolution of this issue requires access to documents and witnesses in India, involves the complexities of interpreting foreign law, and is far better suited to an Indian forum."⁹⁵ Again, although the court's discussion is brief, it appears to recognize the significance of the alleged customs ban of off-spec goods in India as a critical factor in the defendant's ability to defend a charge of breach. The court also recognized the local nature of customs law and importance of deferring to the foreign forum on this issue.

Finally, the district court acknowledged that a foreign plaintiff's choice of forum may be accorded less deference than that traditionally accorded to a citizen plaintiff's choice. The court adopted the *Piper* standard, noting that while Maganlal's alien citizenship is not dispositive, his choice of forum in fact warranted less deference when the litigation is otherwise convenient.⁹⁶

C. *The Reversal by the Court of Appeals*

In an opinion by Judge Altimari, the Court of Appeals for the Second Circuit held that the district court improperly balanced the private and public interests by placing undue emphasis on the relevance of Indian customs law to the case at hand.⁹⁷ The court of appeals viewed the district court's dismissal as an abuse of the lower court's discretion that warranted reversal.⁹⁸

95. *Maganlal*, No. 91-7085, 1991 Dist. LEXIS 16385, at *6.

96. *Id.* at *7 (citing *Gulf*, 330 U.S. at 508).

97. *Maganlal*, 942 F.2d at 168-69.

98. The court acknowledged that the district court has broad discretion in deciding whether to dismiss an action on the grounds of *forum non conveniens*. *Id.* at 167. See also *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 827 (2d Cir.

The court of appeals accepted the lower court's finding that India was an adequate alternate forum⁹⁹ and that the foreign plaintiff's choice of forum was entitled to less deference than that of a United States citizen.¹⁰⁰ Although neither court articulated what weight this deference carried in the forum non conveniens analysis, the court of appeals appeared to give the plaintiff greater deference in the balancing test, noting that the reduced weight "is 'not an invitation to accord a foreign plaintiff's selection of [a] forum no deference since dismissal for forum non conveniens is the exception rather than the rule.'"¹⁰¹

The court disregarded the weight accorded by the district court to the private interest of the defendant in obtaining evidence abroad by emphasizing the fact that the LDPE had been examined by two private entities, one of which concluded that the damage appeared to have occurred prior to shipping.¹⁰² The court also found that the availability of judicially assisted discovery procedures through the Federal Rules of Civil Procedure, as well as the proposed cooperation of the plaintiff, diminished the weight of the defendant's burden.

The court of appeals and the district court both applied the same relevant *Gulf* factors,¹⁰³ but disagreed whether, in light

1990), *cert. denied*, 111 S. Ct. 2259 (1991); *Irish Nat'l Ins. Co. v. Aer Lingus Teoranta*, 739 F.2d 90, 92 (2d Cir. 1984). However, the court noted that limitations of this discretion are set so as not to preclude "meaningful appellate review." *Maganlal*, 942 F.2d at 167; *Overseas Programming Cos. v. Cinematographische Commerz-Anstalt*, 684 F.2d 232 (2d Cir. 1982). *See also* *Overseas Nat'l Airways Inc. v. Cargolux Airlines Int'l, S.A.*, 712 F.2d 11, 15 (2d Cir. 1983) (Oakes, J., concurring).

99. *Maganlal*, 942 F.2d at 167.

100. *Id.* at 167-68.

101. *Id.* at 168 (citing *Lacey v. Cessna Aircraft Co.*, 862 F.2d 38, 45-46 (3d Cir. 1988)) (quoting *In re Air Crash Disaster Near New Orleans, La.*, On July 9, 1982, 821 F.2d 1147, 1164 n.26 (5th Cir. 1987) (en banc), *vacated on other grounds*, 490 U.S. 1032 (1989)).

102. *Maganlal*, 942 F.2d at 166, 169. However, the court still conceded that it was not clear "whether the basis of the authorities' action was that the LDPE was adulterated or that Maganlal's import license simply did not permit the importation of 'off-spec' goods." *Id.* at 166.

103. A summary denial of a forum non conveniens motion would be an abuse of discretion. *See In re Air Crash*, 821 F.2d at 1166. This was not an instance where the lower court abused its discretion for failing to address the weight given to the

of these factors, the balance of convenience tilted strongly in favor of trial in a foreign forum.¹⁰⁴ The disparity in the two courts' conclusions can be traced to their interpretations of the relevant legal issues in the case. The court of appeals found that the district court's focus on M.G.'s defense and its relationship to Indian customs law "skewed the court's analysis of the relevant *Gulf* factors."¹⁰⁵ The court of appeals favored the plaintiffs argument that whether the off-spec LDPE was covered by the plaintiffs import license was irrelevant to the issue of whether the LDPE conformed to the contract.¹⁰⁶ Shifting the focus of the analysis, the court subsequently found that the evidence of United States industry standards for off-spec LDPE and the condition of the LDPE prior to shipping were central to the inquiry. The court de-emphasized the inconvenience resulting from the location of the actual LDPE in India by relying upon the existence of a private examination by Lloyds of London in Bombay and the plaintiffs willingness to provide the defendant with samples of the LDPE for independent testing.¹⁰⁷

IV. CASE ANALYSIS

Both of the courts in *R. Maganlal Co. v. M.G. Chem. Co.*, applied the balancing test articulated in *Gulf*, but came to radically different conclusions. This was not a "close case" in the eyes of either court. Rather, the differences in their opinions originated in significant disagreements about the relevant substantive issues of the case to be addressed in the forum non conveniens analysis. In addition, the courts differed in their

Gulf factors or dismissing summarily. See *Maganlal*, 942 F.2d at 169.

104. *Id.* at 168. The Supreme Court has held that because there is a strong presumption in favor of the plaintiff's choice of forum, that choice will not be overcome unless the relevant private and public interest factors weigh heavily in favor of trial in the alternative forum. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255-56 (1981); *Lacey*, 932 F.2d at 180 (holding that even when there is a foreign plaintiff, the balance must tilt strongly in favor of dismissal). See also 15 WRIGHT ET AL., *supra* note 2, at § 3828.

105. *Maganlal*, 942 F.2d at 168.

106. *Id.* at 165.

107. *Id.* at 166, 168.

approach to the forum non conveniens analysis regarding the weight they ascribed to the deference accorded to foreign plaintiffs and the interest of American federal courts in adjudicating private international contract disputes.

In the analysis of private interest factors, the court of appeals disregarded the difficulty of obtaining evidence in India and the fact that the use of cumbersome foreign discovery procedures and party cooperation have not been accepted by the Supreme Court as satisfactory substitutes for more convenient local discovery mechanisms.¹⁰⁸ The court of appeals also appears to have accorded greater deference to the foreign plaintiff than did the lower court or the Supreme Court in the prior *Piper* decision.

The court of appeals' subsequent analysis of public interest factors reflected its unwillingness to acknowledge the potential significance of Indian customs law in relation to the breach claim and India's competing interest as a forum for this dispute. Having found no relevance in the customs law issue, the court did not ascribe any weight to its own interest in avoiding the application of foreign law. Furthermore, by perfunctorily relying upon the extraterritorial application of Federal Rules of Civil Procedure as a means of obtaining evidence abroad, the court failed to address potential violations of comity inherent in the imposition of discovery mechanisms that are not recognized within India's borders.

The court of appeals' reversal limits the scope of the trial court's discretion and increases the likelihood of plaintiffs surviving forum non conveniens motions. More importantly, the court does not provide a clear explanation of the reasoning or intent underlying this protective approach. This analysis will address these gaps in the court of appeals' reasoning and demonstrate its inconsistency with applicable forum non conveniens doctrine.

108. See *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511 (1947).

A. *Private Interest Factors*

The court of appeals incorrectly weighed the private interest factors concerning the availability of relevant evidence and witnesses in the *Maganlal* case when it refused to acknowledge the enormous burdens placed on M.G. in effectuating discovery procedures abroad.¹⁰⁹ The court's contention that the customs issue was of "secondary importance" clearly reframed the entire private interest analysis. The court's emphasis on the issue of the conformity of the LDPE to an, as of yet, unidentified industry standard for off-spec materials led it to consider only the evidence pertaining to the condition of the LDPE prior to shipment from Houston and the industry standard among American manufacturers. Thus, the court concluded that the "only" evidence that was not in the United States was the LDPE itself. Moreover, the court disregarded the importance of the LDPE's location abroad by assuming the adequacy of foreign discovery procedures.

Accepting, arguendo, that the only evidence of relevance in India was the LDPE in question, the court's argument that this evidence could be properly examined through international discovery is not only unsubstantiated, but also begs the question of the forum non conveniens inquiry. By assuming the adequacy of letters rogatory¹¹⁰ as a means of compelling discovery, the

109. Had the court acknowledged the need for *each* party to have full inspection of the LDPE, (see Appellee's Brief, *supra* note 78, at 9) it would have found the lower court's dismissal appropriate. See *Pain v. United Technologies Inc.*, 637 F.2d 775, 788 (D.C. Cir. 1980) ("Thus, so long as trial were to be conducted in the United States, the inability of both parties to obtain the full panoply of . . . [foreign] evidence would greatly hinder fair resolution of the dispute.").

110. Letters Rogatory are a formalized means of requesting the judicial assistance of a foreign state to obtain evidence, whether physical, testimonial or through compulsory process, where the requesting court has no power or jurisdiction to do so alone. See *Devine & Olsen*, *supra* note 19, at 372-73. A party must seek issuance of a letter rogatory from the United States court pursuant to Federal Rule of Civil Procedure 28(b). Letters rogatory arise out of relationships of comity and are not granted as of right. As a result, they are not only unreliable, but also technically tedious and time consuming. BORN & WESTIN, *supra* note 20, at 305-08. See also 22 C.F.R. § 92.54-92.66 (1992); JAMES W. MOORE ET AL., MOORE'S FEDERAL PRACTICE

court evaded the question of how feasible or burdensome this method might actually be for the defendant.¹¹¹ In reality, India has no obligation whatsoever (outside of the general principles of comity) to provide evidence to a foreign tribunal because India is not a member of the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters,¹¹² an international agreement which harmonizes reciprocal discovery procedures between sovereign nations. Indeed, it is the enormous difficulty of obtaining evidence in civil-law countries through foreign "judicial assistance" that inspired the diplomatic efforts which culminated in the Hague Convention.¹¹³ Without the aid of an international agreement, the defendant is forced to rely on

§ 28.05 (2d ed. 1987); BRUNO RISTAU, *INTERNATIONAL JUDICIAL ASSISTANCE*, §§ 3-36 to 3-47 (1984 & Supp. 1986).

If the receiving country is a signatory to the Hague Convention on the Taking of Evidence in Civil or Commercial Matters, *infra* note 112, the letter rogatory must be transmitted to the Central Authority of that country to determine whether it comports with the treaty. The request will usually not be granted if it seeks a form of discovery not permitted under the Convention or the domestic rules of the receiving jurisdiction.

The costs of this process may well exceed the amount in controversy considering the cost of travel, translation, and the potential that—inasmuch as the discovery requested may differ from accepted United States standards of evidence—such extensive efforts may not even guarantee evidence which may be admissible in a United States court. See Waller, *supra* note 15, at 941-42 n.71 (describing this process and its pitfalls). See also RISTAU, *supra*, (providing a detailed description of the procedures required by each signatory of the Hague Convention).

111. BORN & WESTIN, *supra* note 20, at 261-84. ("the scope of discovery in most foreign countries is generally much more limited than pretrial U.S. discovery, which most foreigners regard as . . . 'fishing expeditions' The comparatively restrictive scope of foreign discovery generally reflects [the] important foreign public policies, such as protection against unreasonable intrusion into personal privacy.") BORN & WESTIN, *supra* note 20, at 265.

112. Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters, *opened for signature* Mar. 18, 1970, 23 U.S.T. 2555, 847 U.N.T.S. 241. Signatories to this convention include Austria, Belgium, Canada, Czechoslovakia, Denmark, Finland, France, the Federal Republic of Germany, Greece, Ireland, Israel, Italy, Japan, Luxembourg, Monaco, the Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, the United Arab Republic, the United Kingdom, the United States, and Yugoslavia. *Id.*

113. See D.M. Edwards, *Hague Conference of Private International Law: Commission III—Taking Evidence Abroad in Civil or Commercial Matters*, 18 INT'L & COMP. L.Q. 646, 647 (1969).

tenuous diplomatic relationships to obtain crucial evidence. If at all successful, he will likely face burdensome delay and cost in the process.

In speaking of exactly such difficulties, one commentator has stated that, "procedures presently permitted by many American courts [are] so completely alien to the procedure in most other jurisdictions that an attitude of suspicion and hostility is created, which sometimes causes discovery which would be considered proper, even narrow, in this country to be regarded as a fishing expedition elsewhere."¹¹⁴ Yet, the court of appeals unquestionably assumed the cooperation of the Indian courts' "judicial assistance," as if the Federal Rules of Civil Procedure were universally accepted.

This assumption was confounded by the fact that the actual LDPE in question was not even in the defendant's possession. In this case, the LDPE had been detained by customs officials and remained in the custody of the Indian government.¹¹⁵ Since a United States court has no personal jurisdiction over the customs officials or the government of a foreign country, it must rely on the "judicial assistance" of the Indian courts to obtain access to this evidence.¹¹⁶ Despite these jurisdictional obstacles, the court did not even acknowledge the issue of nonparty discovery in relation to the LDPE. This oversight is baffling in light of the core issue of convenience; however, it may simply reflect a general lack of familiarity with the drastically different nature

114. James H. Carter, *Existing Rules and Procedures* 13 INT'L LAW. 5 (1979).

115. An order requiring a litigant to produce documents or the copying, testing or sampling of things under Federal Rule of Civil Procedure 34, is in and of itself an extraterritorial application of United States jurisdiction when the subject of the order is abroad. In the case of compelling a litigant, the court can justify its jurisdiction on the basis of the court's in personam jurisdiction over the party. However, here an order would be issued against the Indian government itself—an act which would violate notions of comity and state sovereignty.

For a discussion of the court's power to order a party over whom it has personal jurisdiction to take some action abroad, see Ivo T. Onkelinx, *Conflict of International Jurisdiction: Ordering the Production of Documents In Violation of the Law of Situs*, 64 NW. U. L. REV. 150 (1969).

116. See *supra* note 110 on letters rogatory.

of international discovery permitted by countries other than the United States.

Furthermore, given the fact that the relevant evidence was seized by customs officials, it would have been practically and legally very difficult to gain access to what was essentially already the state's evidence in an Indian customs proceeding. In response to the defendant's concern over the difficulties of obtaining evidence abroad, the court suggested that the parties might obtain samples of the LDPE through letters rogatory, an alternative which the court failed to critically examine.¹¹⁷ As previously mentioned, letters rogatory, unlike the Federal Rules of Civil Procedure, do not implicate extraterritorial jurisdiction because they are by their nature mere requests to the foreign forum itself.¹¹⁸ However, since these letters are mere requests for "judicial assistance," the foreign forum is not obligated to honor them at all, much less in the manner sought by the outside forum. Even if the foreign forum honors the request, it will do so within the customs and restrictions of its own jurisdiction.¹¹⁹

Letters rogatory are also an inadequate alternative for the defendant because they are extraordinarily time-consuming and burdensome to execute. The letters must comply with the technical requirements of the forum to which they are directed, and, in most cases, must be certified by a variety of authorities and translated into the language of the foreign forum.¹²⁰ Not only is this process technically inconvenient, but it may take from three months to a year.¹²¹

117. A letter rogatory is a formal request for the judicial assistance of another forum's court in performing judicial acts. *See supra* note 110.

118. BORN & WESTIN, *supra* note 20, at 306.

119. BORN & WESTIN, *supra* note 20, at 307; Carter, *supra* note 114, at 13, 15. Carter explains that in non-convention states and some civil-law countries the rules governing requests may be very restrictive and the authorizations of the Federal Rules of Civil Procedure "are meaningless if they cannot be matched with a right to act in the specific foreign nation in question." Carter, *supra* note 114, at 13.

120. BORN & WESTIN, *supra* note 20, at 307.

121. Devine & Olsen, *supra* note 19, at 374 n.38. This delay is attributable to the requirement that letters rogatory be sent through appropriate diplomatic channels. This usually requires sending the letter through the United States Department

This method of discovery places an enormous burden on M.G. In order to develop substantive defenses, such as impossibility or illegality of the underlying contract, M.G. would be required to obtain the testimony of customs officials as to both the status of Indian customs law at the time of the LDPE delivery, and the facts surrounding the arrival of the LDPE that prevented the import of the goods that Maganlal requested. The difficulty of executing letters rogatory, as well as the restrictions foreign courts place on the taking of depositions, could severely limit the scope of Maganlal's ability to pursue its own defense.

Given these issues, the court clearly erred in its determination of the relative convenience of a trial in the United States. Unlike India, the United States is a member of the Hague Evidence Convention and has liberal discovery policies which make obtaining evidence located in the United States for utilization abroad the preferable alternative under the balancing of private factors. Moreover, when the scope of relevant evidence is broadened to include the circumstances surrounding India's seizure of LDPE, the barriers to obtaining evidence in India may be seen as the kind of burden that calls for the application of *forum non conveniens*.

B. *Public Interest Factors*

Turning to the issue of public interest factors, the court of appeals correctly noted that "it is well established that the need to apply foreign law is not alone sufficient to dismiss under the doctrine of *forum non conveniens*."¹²² However, the court failed to acknowledge the relevance of Indian law to the substantive breach dispute even though this law goes directly to the determination of damages and the merits of potential defenses to the contract such as impossibility and/or illegality.¹²³ The defense

of State and other foreign officials. See 22 C.F.R. § 92.66 (1992); RISTAU, *supra* note 110, § 3-45.

122. R. Maganlal & Co. v. M.G. Chem. Co., No. 91-7085, 1990 U.S. Dist. LEXIS 16385, at *6 (S.D.N.Y.), *rev'd*, 942 F.2d 164 (2d Cir. 1991).

123. Under accepted principles of contract law, a contract may be found void or voidable based on illegality or impossibility of its performance, and the party may

argued that Indian customs law in fact made the import of *any* type of off-spec goods illegal. The plaintiff's understanding of this risk was exhibited by his effort to characterize the goods as prime virgin material on the original purchase order.¹²⁴

The Indian customs law which restricts the importation of off-spec goods does not present a "true conflict" of law in the traditional sense of the doctrine because it does not speak directly to the terms of a breach nor does it directly contradict United States policy regarding the regulation of contracts.¹²⁵ The customs issue does, however, raise significant tensions in comity that arise in the arena of international trade, where the laws of both the import and export nation as well as the international law of treaties apply to the transaction. The court's exclusion of the customs issue diverts its analysis away from India's interest as a sovereign nation in enforcing its own national laws and policies relating to import licenses and import contracts.

By examining the dispute as a private breach of contract, isolated from the relevance of import law, the court was blind to the enormous implications of customs law in international commercial disputes and relegated it to a "secondary issue." At the time of the transaction in question, India had strictly limited imports and the use of hard currency.¹²⁶ India had an explicit interest in resolving the conflict raised by the plaintiff's allegations of breach—in light of the plaintiff's own purported violation of the import license issued by Indian state officials. Regardless of the ultimate relevance of these issues to the defense's case, it

be discharged of her duty of performance. See RESTATEMENT (SECOND) OF CONTRACTS §§ 261, 264 (1981). In this case, the very terms of Maganlal's purchase request, off-spec LDPE, were an impermissible transaction under the customs laws of India, and enforcement of the contract would violate the sovereign interests of India.

124. See Appellee's Brief, *supra* note 78.

125. See *supra* note 25 for a discussion of "true" conflicts. India's prohibition on the import of any off-spec goods is not in conflict with terms or policies underlying breach of contract claims under New York law. However, India's customs regulations are certainly relevant to issues of illegality and impossibility and should, therefore, be incorporated into the court's analysis of the breach claim. In addition, the customs issue in this case raises India's interest in adjudicating a suit which directly involves the enforcement of its domestic regulatory schemes.

126. Appellee's Brief, *supra* note 78, at 9-11.

seems clear that if the plaintiff violated Indian customs law, to permit the plaintiff to then recover damages arising out of the same transaction would subvert the legitimate regulatory interests of India. The court's complete disregard of India's interest in the resolution of the case violates the principles of comity and respect for India's sovereignty as a nation.¹²⁷

If the court had acknowledged the relevance of Indian law and the national interests of India in the dispute, both the doctrines of comity and *forum non conveniens* would require a balancing of United States interests against those of the foreign forum. Unlike the district court, the court of appeals attributed great weight to the interests of New York in adjudicating the breach of a contract negotiated and signed in New York on behalf of a New York corporation (M.G. Chemical Co.).¹²⁸ However, the court made no explicit effort to explore the substance of these "interests" and their importance to the respective forums.¹²⁹ Had the court of appeals compared the national importance of customs law with the Indian government to the interest of New York in adjudicating a private breach of contract that was only related to the forum by formality, the balance of "local interests in the controversy" should have tipped heavily in favor of India.

The court of appeals' disregard for issues regarding Indian customs law also precluded its recognition of potential choice-of-law questions. The *forum non conveniens* analysis obviated an evaluation of the inconvenience raised by applying foreign law or deciding between conflicting law or policies. Had the illegality of importing off-spec goods been incorporated into the court's view of the breach action, the dispute would presumably have required the application of foreign law in either forum. As the situs of the negotiation and signing of the contract, New York

127. For discussion of court recognition of foreign state interests in the *forum non conveniens* determination, see *Panama Processes, S.A. v. Cities Serv., Co.*, 650 F.2d 408 (2d Cir. 1981). See generally Waller, *supra* note 15.

128. *R. Maganlal Co. v. M.G. Chem. Co.*, 942 F.2d 164, 169 (2d Cir. 1991).

129. See generally Waller, *supra* note 15 (arguing that a meaningful balancing test inquiry must substantiate the purported interests of competing forums by examining their articulated policies and practice).

law would probably control the standard applied to a breach claim.¹³⁰ However, if the court had given any weight to the importance of Indian customs law as the basis for an affirmative defense to the breach, the complexities of applying this law would have favored dismissal. The determination of the customs issue would have required both extensive factual testimony by customs officials and resolution of open-ended legal issues. Indeed, the question of whether the LDPE fell within the scope of the plaintiff's import license was not resolved by the Customs Excise Appellate and Gold Control Tribunal (Tribunal). The Tribunal held that whether "the goods were disposal goods" and, therefore, "not covered by the import license, has not been established."¹³¹ The court of appeals claimed to attribute no significance to the Tribunal's decision,¹³² but the issue will, nevertheless, have to be confronted during the course of litigation at which time the Tribunal's decision would offer little guidance to a United States court. In light of this fact, the familiarity of Indian courts with local law and their access to customs officials would make India the more competent and convenient forum to evaluate relevance of these issues to Maganlal's defense.

Conversely, the application of United States law in India would present fewer difficulties. New York law concerning breach of contract would probably offer sufficient guidance to a foreign forum. Further, the "industry standard" for LDPE, although not yet determined, would be a largely factual inquiry facilitated by more liberal United States discovery policies under

130. The court does not identify exactly what United States law will be applied to the breach issue. The lower court stated that the plaintiff's attempt to argue that the contract required application of the U.C.C. requirements for "Final Offer" was incorrect, *Maganlal*, No. 91-7085, 1990 U.S. Dist. LEXIS 16385, at *6 n.3, and the court of appeals made no comment on this issue. Under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), the federal court sitting in diversity must apply the conflicts rules of the state in which it sits, e.g., New York. Under New York law, the law of New York would control the breach claim because New York was the site of the negotiation and signing of the contract.

131. *Maganlal*, 942 F.2d at 169 n.1 (the court states that neither the basis of this decision nor its ultimate resolution were available at the time the forum non conveniens motion was decided).

132. *Id.*

the Hague Convention. Finally, the importance of this standard in defining a breach may in fact be of little relevance given that India's laws appear to ban even the highest quality off-spec materials and would have rendered performance under the terms of the contract impossible.

C. Abuse of Discretion

The Supreme Court has emphasized the broad discretion accorded to district courts in deciding whether to dismiss on the basis of forum non conveniens.¹³³ The appellate scope of review is strictly limited to those cases in which the district court has clearly abused its discretion.¹³⁴ The court of appeals incorrectly reversed the district court's forum non conveniens dismissal by replacing its own judgement for that of Judge Lowe's reasonable conclusions.¹³⁵ By summarily disregarding the importance of evidence and legal questions that were relevant to the entire scope of the case, the court of appeals disregarded the burden that trial in the United States placed on M.G.'s ability to develop its defense.

The court of appeals argued that the district court "erred in concluding that [the] issues of Indian law and access to witnesses in India were central to resolving the case,"¹³⁶ and that "this

133. See *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981).

134. See *Piper*, 454 U.S. at 257; *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508 (1947); *Borden, Inc. v. Meiji Milk Prods. Co.*, 919 F.2d 822, 827 (2d Cir. 1990) (citing *Olinick & Sons v. Dempster Bros., Inc.*, 365 F.2d 439 (2d Cir. 1966)).

135. Appellate court review of forum non conveniens decisions is limited to the abuse of discretion standard which is deferential to trial judges. See JACK H. FRIEDENTHAL ET AL., *CIVIL PROCEDURE* § 13.4 (1985). The role of the appellate court in reversing the lower court's determination is to ensure that it is reasonable rather than to decide the issue de novo. See *In re Aircrash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1166-67 (5th Cir. 1987) (en banc), *vacated on other grounds*, 490 U.S. 1032 (1989). See also *Filmline (Cross-Country) Prods., Inc. v. United Artists Corp.*, 865 F.2d 513, 520 (2d Cir. 1989) (noting that district court's venue determination is upheld except in cases of "clear abuse"). However, it has been noted that there is no "clear line" that distinguishes even the "clear abuse" standard. Christina M. Morin, *Review and Appeal of Forum Non Conveniens and Venue Transfer Orders*, 59 GEO. WASH. L. REV. 715, 719-20 (1991).

136. *Maganlal*, 942 F.2d at 168.

error tainted the court's entire forum non conveniens analysis."¹³⁷ Yet the resolution of these issues directly affected the defendant's affirmative defenses, which in turn could have affected, if not defeated, the merits of the breach claim. More specifically, M.G. argued that Indian customs law and the plaintiff's import license precluded the importation of anything other than "pure virgin" LDPE at the time of the transaction. This issue was directly relevant to the issue of damages, a prima facie requirement of any breach claim. As the plaintiff conceded to the court, the damages would logically be "nil" if the plaintiff could not have obtained the goods regardless of their conformity to the contract's specifications.¹³⁸ Similarly, the alleged restriction of all off-spec materials by Indian customs regulation was directly relevant to the defense of illegality and impossibility. The contract that the plaintiff sought to enforce would have been per se invalid, and therefore unqualified for judicial remedy, if its very performance were illegal or impossible by virtue of Indian law.

The court of appeals also argued that the only relevant evidence was information regarding the conformity of the goods to the ill-defined industry standard for off-spec LDPE. Yet Dupont itself, a leading manufacturer of LDPE and the only logical source of this information, defines these goods as simply that which is not pure virgin material.¹³⁹ This unidentified evidence in the United States is the only evidence not located in India. If the court had recognized its irrelevance, it would have also recognized that this case was much like the *Gulf/Koster/Piper* trilogy in which the absence of any relevant evidence within the chosen forum's jurisdiction weighed strongly in favor of dismissal.

The court of appeals' reversal also inappropriately restricts the discretion of district courts in forum non conveniens determinations. It may be argued that Judge Lowe could have gone to greater lengths to discuss her analysis and address the plaintiff's counter-arguments,¹⁴⁰ but her opinion was not merely

137. *Id.*

138. Appellee's Brief, *supra* note 78, at 4, 9.

139. Appellee's Brief, *supra* note 78, at 2.

140. Merely purporting to have considered the proper factors for a forum non

conclusory, and her analysis touched on all of the relevant public and private interest factors in the balancing test inquiry—without according undue weight to any one particular issue. Commenting on the improper reversal of a trial court's forum non conveniens dismissal, the Supreme Court has stated:

The forum non conveniens determination is committed to the sound discretion of the trial court. It may be reversed only when there has been a clear abuse of discretion; where the court has considered all relevant public and private factors, and where its balancing of those factors is reasonable, its decision deserves substantial deference.¹⁴¹

The court of appeals disagreed with the lower court's framing of the legal issues, but its arguments failed to genuinely contradict the compelling issues of inconvenience that favored dismissal.

D. Conclusion

The court of appeals' reversal of the district court's opinion reflects an overly protective attitude towards foreign plaintiffs and expansive notion of governmental interests in the face of compelling issues of inconvenience that would normally favor dismissal. The court of appeals violated principles of comity by rejecting the relevance of Indian customs law and assuming that extraterritorial application of the Federal Rules of Civil Procedure would override the burdensome obstacles to obtaining evidence in the possession of the Indian government. The court defeated the function of forum non conveniens as a means of relieving the parties and courts of inconvenient litigation and

conveniens dismissal is not sufficient. *See* *Fine v. McGuire*, 433 F.2d 499, 501 (D.C. Cir. 1970).

Additionally, appellate courts have remanded cases where the trial court considered only the negative consequences of a forum non conveniens dismissal. *See, e.g.,* *Foundling Church of Scientology of Washington, D.C. v. Verleg*, 536 F.2d 429 (D.C. Cir. 1979).

141. *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 511-12 (1947) and *Koster v. Lumbermans Mut. Casualty Co.*, 330 U.S. 518, 531 (1947)).

respecting the competing interests of foreign forums in adjudicating "local controversies at home."¹⁴²

Of equal importance, the court also placed an unfair burden on the defendant's ability to challenge the suit against him by precluding the issues of illegality and impossibility without examining the factual merits of these defenses. The court failed to acknowledge the impracticability of obtaining evidence in the possession of a government that is not even a party to the Hague Convention,¹⁴³ not to mention the burdensome cost of the proposed "letters of rogatory" which could easily exceed the damages alleged by the plaintiff.¹⁴⁴ The defendant's inability to obtain evidence abroad demonstrates how the plaintiff's choice of forum can prejudice the defendant, especially when the defendant is a small firm with limited resources and the plaintiff has the home court access to the evidence.¹⁴⁵ The court undermined the premise of *forum non conveniens* which calls for trial where the forum will "best serve the convenience of the parties and the ends of justice."¹⁴⁶

V. IMPLICATIONS OF THE *MAGANLAL* DECISION FOR INTERNATIONAL LITIGATION

The *forum non conveniens* decision of the court of appeals in *R. Maganlal Co. v. M.G. Chem., Co.*, reflects the unpredictability and inconsistency of a doctrine that is discretionary and based on the balancing of many loosely defined factors. *Forum non conveniens* motions will never be very predictable because they are highly fact centered. However, the *Maganlal* decision points to the need for more clearly defined standards concerning the deference accorded to foreign plaintiffs and the analysis of public interest factors. In particular, there is a need to refine the ways in which the court defines what national or local interests

142. *Gulf*, 330 U.S. at 509.

143. *Hague Convention*, *supra* note 112.

144. Appellee's Brief, *supra* note 78, at 4.

145. Appellee's Brief, *supra* note 78, at 8 (citing BORN & WESTIN, *supra* note 20, at 209).

146. *Koster*, 330 U.S. at 527.

will substantiate the retention or dismissal of jurisdiction over suits which may also be tried abroad. The Second Circuit's rulings have been protective towards foreign plaintiffs and the court's role in the application and furtherance of American legal standards. Although these policies may be seen as progressive attempts to accord liberal access to the rights of plaintiffs seeking redress, they threaten to place unjust burdens on defendants and violate principles of comity by diminishing national interests abroad.

Foreign plaintiffs are initially accorded the very same access to American courts as are residents, but where other issues of inconvenience raise the forum non conveniens inquiry, the foreign plaintiff's choice of forum is accorded less deference. The *Maganlal* court claimed to apply this diminished level of deference but, as is often the case, the role of this diminished deference was not at all explicit in the court's reasoning. Instead, the plaintiff's claims were favored over the defendant's potential defenses as the central basis for the convenience inquiry, and the defendant was subjected to significant burdens. Given the strength of the court's preference toward retaining jurisdiction in the face of such countervailing problems as the location of evidence abroad and the handling of issues related to foreign law, it seems that even the "diminished" deference to *Maganlal* remained quite powerful.

In international commercial disputes which involve several potential trial forums, the deference normally accorded to plaintiffs is inappropriate. The issue of how much deference should be accorded to the plaintiff's choice of forum has been the subject of much debate. One commentator has argued that such deference to the plaintiff's choice is misplaced¹⁴⁷ and lacks any sound justification by the courts which could effectively guide the application of the principle.¹⁴⁸ On the other hand, deference

147. Stein, *supra* note 3, at 816.

148. Stein, *supra* note 3, at 817; but cf. David E. Seidelson, *Jurisdiction of Federal Courts Hearing Federal Cases: An Examination of the Propriety of the Limitations Imposed by Venue Restrictions*, 37 GEO. WASH. L. REV. 82, 85-86 (1968) (presumption *in limine* that plaintiff has been wronged by the defendant justifies inconveniencing

to the plaintiff has been justified as the counterpart to the safeguards of personal jurisdiction conferred on the defendant. However, where longarm statutes and extraterritoriality have diminished these safeguards, unquestioned deference to plaintiff's choice of forum is unbalanced in the adversarial system and fails to address the complexities of international litigation. Furthermore, since United States courts have proven to be a most popular forum, this policy undoubtedly promotes forum shopping, which impedes efficient adjudication of disputes and needlessly inconveniences the parties and the courts.

Once the *forum non conveniens* inquiry is raised, it would be reasonable to assess the plaintiffs' choice of forum in light of the realistic convenience it offers to the plaintiff as well as the burden it creates for the defendant. Plaintiffs may reasonably seek a forum that is most favorable to their case, but it is unfair to tolerate forum shopping to the extent that it clearly burdens the defendant with logistical inconveniences from the outset of litigation. More importantly, the overriding interests of the courts in adjudicating local controversies at home, as well as respect for the principles of comity and the prevention of the severe overcrowding of court dockets, are all factors which weigh heavily against a deferential policy towards the plaintiff's choice of forum.

The policy of deferring to the plaintiff's choice of forum is supported by the fact that it is the plaintiff who has chosen the suit, presumably suffered some wrong, and invested in the costs of initiating the suit in a particular forum. However, the defendant's lack of choice in the litigation and similar expenses in their own defense cannot be forgotten. Parties to international commercial contracts would wisely opt for forum selection clauses and consider the potential for litigation even for a contract as pedestrian as the one involved in *Maganlal*. However, without such guidance, the courts may balance the potential hardships to defendants by substantiating the deference accorded to a plaintiff's choice of forum on the basis of the factors which in-

the defendant rather than the plaintiff).

form the entire forum non conveniens analysis—the convenience of the parties and the interests of justice.

The role of local/national interests, conflicts-of-law and comity are also poorly defined within the forum non conveniens analysis.¹⁴⁹ The *Maganlal* decision subverted these issues by disregarding issues of customs law. The court's acceptance of the plaintiff's argument that the import license was "irrelevant" to whether the LDPE conformed to the contract resulted in a blinded view of the legal issues involved in the forum non conveniens analysis. This has profound implications for all defendants raising defenses that involve foreign law and evidence. As this opinion demonstrates, the court can redefine the forum non conveniens analysis by weighing the relevance of pertinent legal issues according to the forum's desired "local interest." As a result, the court shifts the inquiry as to which law and evidence will be the subject of a balancing test in such a way that the principles of convenience are defeated. This approach will necessarily lead to inconsistent and unfair results in commercial disputes because of its failure to acknowledge the dynamics between local and foreign trade law.

Although one forum's law may control the contract (most probably the forum in which the contract was formed), private customs law and national regulation of trade in the importing nation will be relevant to its ultimate performance. Additionally, there are international customs and treaties that guide international transactions separate and apart from any one forum's contract law. The *Maganlal* case is a typical example of the way in which foreign law may be of great relevance to the merits of the claim without necessarily being the controlling law of the contract under a conflicts of law analysis. Customs law and practice tend to be inconsistently interpreted and applied because they are frequently shaped by politics, shifting national policy and the local practice of customs officials. Cases that are

149. These public interest factors concern the convenience of the court—the difficulties in applying foreign law and the propriety of expending judicial resources and docket space on disputes with little relationship to the forum. See *supra* notes 50-53 and accompanying text.

significantly affected by customs issues should therefore be tried in the forum where customs officials and experts are available to provide necessary information.

The failure to recognize the importance of foreign customs law in international commercial disputes may also lead courts to overlook the overriding national interests of the importing country in adjudicating these disputes. As was the case in *Maganlal*, customs law is frequently shaped by important national and economic policies. The interests of comity are best served by a *forum non conveniens* analysis that addresses a wide scope of legal interests where international commercial disputes are concerned.

The *Maganlal* court's assertion that New York had an important local interest in adjudicating the breach of a contract signed in New York is unconvincing. Countless contracts are signed in New York every day, not because they have any substantial connection to the state, but because New York is a major center of international business. In this case, the parties were represented by Canadian agents and a Canadian bank, and the goods were shipped from Texas to a destination in India. Although M.G. was incorporated in New York, this factor was not a significant issue in the litigation. The court's claim that it has a stake in every contract signed within its borders overlooks the interests of numerous forums involved and makes an arbitrary distinction which ultimately may be irrelevant to the convenience of the parties or the courts.

The court of appeals' broad articulation of local interests also perpetuated the highly protective and regulatory nature of the American legal system which threatens the principles of comity.¹⁵⁰ Plaintiffs seek the protection of American courts for their liberal policies, but international tensions arise when the United States harbors suits in which foreign nations have a

150. Some commentators argue that the highly protective and regulatory nature of the United States legal system is reflected by a broad formulation of "national interests" and the "effects test," and that this has resulted in the application of extraterritorial jurisdiction that is based on rhetoric of political interests more than on the appropriate consideration of the private dispute in question. See, e.g., Waller, *supra* note 15, at 941-53.

much stronger political or economic interest. Furthermore, the public interests of United States courts in controlling their already overflowing dockets and providing adequate resources for truly local disputes also weighs heavily against the retention of jurisdiction over these cases.

The forum non conveniens doctrine explicitly encompasses public interest factors. While addressing the inconvenience of trying cases involving foreign law and policy, forum non conveniens can also be used to further the interests of comity, thus reducing international tensions which could threaten international commercial relations.

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